Propping Open the Courthouse Door: Why Service Members Should Be Able to Bring Sexual Harassment Suits Under the *Feres* Doctrine

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ABSTRACT: Most people would be stunned if they were told that their employer could discriminate against them and they would have no form of civil recourse. However, this is the situation that exists every day for the military personnel serving their country. This is because of a little-known strand of case law, referred to as the Feres *Doctrine. Shortly after World War II, Congress waived its right to sovereign immunity, with some exceptions, through the Federal Tort Claims Act ("FTCA"). In reading through the FTCA, the Supreme Court created an "incident to service" test, called the* Feres *Doctrine, to determine whether a service member can sue the federal government. Since* Feres*, lower courts have struggled to apply the new doctrine to new cases, which has led them to decry it. Despite these reservations, the courts have vastly expanded* Feres*. The primary reasons courts have used for barring recovery to service members are the fear of double compensation under the Veterans' Benefits Act ("VBA") and an unwillingness to encroach on the military decision-making process. However, these concerns ignore the fact that some service members do not receive anything under the VBA and civil actions do not unduly burden the military. In response to the ever-expanding* Feres *Doctrine, this Note seeks to strike a balance between respecting the need for military discipline and permitting injured service members to obtain a recovery. As such, this Note advocates that Congress should amend the FTCA to recognize intentional torts, not explicitly excluded under the FTCA, are viable actions. In addition, Congress should intervene and statutorily permit service members to sue under a Title VII regime for harassment. These tweaks will help the military while also helping victims.*

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I. INTRODUCTION

In Fiscal Year 2016, service members brought 601 complaints of sexual harassment to the military's attention.[1] Four hundred and fifteen individuals

1. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, DEPARTMENT OF DEFENSE FISCAL YEAR 2016 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: APPENDIX H: SEXUAL HARASSMENT DATA 1 (2017), http://sapr.mil/public/docs/reports/FY16_Annual/Appendix_H_Sexual_Harassment_Data.pdf [hereinafter SEXUAL HARASSMENT DATA]. This Note focuses exclusively on sexual harassment rather than sexual assault, because there are currently others writing on sexual assault and the *Feres* Doctrine; however, sexual harassment has been overlooked.

were reported for sexual harassment.[2] Furthermore, 88% "of substantiated incidents occurred on duty."[3] Congress created Title VII to help victims of sexual harassment and other forms of discrimination obtain relief in the corporate context.[4] However, most people do not realize that the Supreme Court intervened in Title VII's application to the military and held that the *Feres* Doctrine bars service members from recovering if their injury[5] is "incidental to service,"[6] which means the *Feres* Doctrine will bar any civil claims sexually harassed service members try to bring against the military.[7]

Within the military, the *Feres* Doctrine prevents service members from suing for injuries "where the injuries arise out of or are in the course of activity incident to service."[8] Loosely based on the Federal Tort Claims Act ("FTCA"), the *Feres* Doctrine started as an effort to keep civilians from interfering with military decisions and prevent service members from obtaining a double recovery under what is now known as the Veterans' Benefits Act ("VBA") and through a civil suit;[9] however, the circuit courts have gradually expanded the doctrine to bar an array of claims, from recreational activities[10] to intentional

2. *Id.* at 2.

3. *Id.*

4. *See* 42 U.S.C. § 2000e–2 (2012) (prohibiting employment discrimination based on an "individual's race, color, religion, sex, or national origin").

5. Traditionally, courts have considered cases dealing with physical injuries. *See generally* Feres v. United States, 340 U.S. 135 (1950) (analyzing three cases which led to the creation of the *Feres* Doctrine). However, lower courts have also barred individuals from suing for non-physical injuries, such as sexual harassment or intentional infliction of emotional distress ("IIED"). *See, e.g.*, Mackey v. United States, 226 F.3d 773, 776–77 (6th Cir. 2000) (holding that *Feres* Doctrine barred plaintiff any chance of recovering for sexual harassment claim).

6. Rachel Natelson, *The Unfairness of the* Feres *Doctrine*, TIME (Feb. 25, 2013), http://nation.time.com/2013/02/25/the-unfairness-of-the-feres-doctrine ("[T]he 'incident to service' provision routinely cited as an impediment best fixed by Congress is nowhere to be found in federal statute, making legislative reform something of an existential puzzle.").

7. *Id.*

8. *Feres*, 340 U.S. at 146.

9. 38 U.S.C. ch. 12 (1950) (codified as amended at 38 U.S.C. Part II (2012)); *Feres*, 340 U.S. at 143–44 (describing the Court's concerns that people may obtain a double recovery and the uniquely federal nature of service member's claims).

10. *See, e.g.*, McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007) (describing how the *Feres* doctrine barred the service member's claim for an injury sustained while using a government owned motorboat). The court stressed "we remain constrained to follow our 'well-worn path' of interpreting the *Feres* doctrine 'to include military-sponsored recreational programs.'" *Id.* (quoting Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001)); *see also* Walls v. United States, 832 F.2d 93, 94–95 (7th Cir. 1987) (explaining that the *Feres* doctrine barred the service member's claim because the airplane which crashed was owned by the recreational Aero Club thus making the sustained injuries incidental to the line of duty); Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1141 (4th Cir. 1975) (stating that the *Feres* doctrine barred the service member's claim because the horse-riding injury stemmed from renting a horse from the Marine-Corps operated stables). The court noted that the "[r]ecreational activity provided by the military can reinforce both morale and health and thus serve the overall military purpose." *Id.*

torts.[11] This has led many courts to express dismay and confusion with the doctrine.[12]

As with any rule, there are often instances where lower courts blindly apply the *Feres* Doctrine to cases in which its rationales do not make sense; however, the courts are bound by the Supreme Court's "incident to service" test.[13] More specifically, lower courts have had to rely on the Supreme Court's concerns in *Feres* that allowing service members to sue the government will implicate "good order and discipline"[14] and will provide injured service members with double compensation.[15] This has led lower courts to bar claims that have little impact on "good order and discipline" and where there is no chance the plaintiff will receive double compensation.[16] As a result, service members and their families often have the courthouse door shut in their face.[17] Meanwhile, the circuit courts have no better idea of how to apply *Feres*, resulting in an ever-expanding doctrine which denies service members any recovery.

This Note argues that Congress should provide service members and their family members, who have no other means of recovery, an avenue to the courthouse. Part II of this Note explains the *Feres* Doctrine's rationale and development.[18] Part III then explains why the three rationales for the *Feres* Doctrine are unfounded and describes how the military has historically said change would negatively impact "good order and discipline," but the change did not negatively impact "good order and discipline."[19] Part IV provides a new solution by arguing that individuals with no other means of recovery should be allowed to recover under the *Feres* Doctrine, and the government should apply a Title VII regime to intra-military actions for intentional torts,

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11. *See* Jaffee v. United States, 663 F.2d 1226, 1234–35 (3d Cir. 1981) (explaining that *Feres* bars intentional tort claims just as readily as it bars negligent tort claims).

12. *See infra* Section III.D.

13. *See, e.g.*, Ortiz v. United States, 786 F.3d 817, 818 (10th Cir. 2015) ("To be sure, the facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *see also infra* Section II.B. The incident to service test says, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

14. United States v. Johnson, 481 U.S. 681, 690 (1987) ("*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" (alterations in original) (quoting United States v. Shearer, 473 U.S. 52, 59 (1985)).

15. *Feres*, 340 U.S. at 144.

16. *See infra* Part III.

17. Dwight Stirling & Dallis Warshaw, *Rethinking the Military's* Feres *Doctrine*, ORANGE COUNTY REG. (June 15, 2017, 12:03 AM), https://www.ocregister.com/2017/06/15/rethinking-the-militarys-feres-doctrine.

18. *See infra* Part II.

19. *See infra* Part III.

which the FTCA does not explicitly bar.[20] Lastly, in Part V, this Note concludes by explaining the broader need to incentivize the military to take sexual harassment claims seriously and how allowing civil suits for sexual harassment claims will provide this incentive.[21]

II. DECIPHERING THE CREATION AND EVOLUTION OF THE *FERES* DOCTRINE

This section examines the creation and evolution of the *Feres* Doctrine. First, it discusses the wrongs that the FTCA sought to rectify. Second, this section discusses the creation of the FTCA and the ensuing creation of the *Feres* Doctrine. Third, this section discusses the *Feres* Doctrine's expansion over time. Fourth, this section focuses on the different circuits' treatment of intra-military tort actions as well as the different circuits' treatment of granting immunity to alleged tortfeasors rather than limiting immunity to the government. Fifth, this section discusses the circuit courts' concerns in applying the *Feres* Doctrine. Sixth, this section concludes by discussing the criticisms of applying the *Feres* Doctrine to sexual harassment.

A. THE FTCA'S CREATION

In 1946, the federal government enacted the FTCA.[22] The FTCA sought to rectify the injustice perpetrated by sovereign immunity,[23] which was brought to America under the British legal system's "premise that 'the King can do no wrong.'"[24] American courts vigorously defended the federal government's right to be free from suits to which it had not consented just as furiously as British courts had protected the Crown.[25] However, as the federal government grew larger, its agents committed greater numbers of torts with no remedy available to the victims solely because the tortfeasors were government agents.[26]

Prior to the FTCA, Congress waived immunity for breaches of contract and certain other claims.[27] In turn, in 1946, as part of the Reorganization Act,[28] Congress passed the FTCA, which waived the United States' sovereign immunity, in limited circumstances, and permitted individuals to sue the

20. *See infra* Part IV.

21. *See infra* Part V.

22. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946).

23. *See* Feres v. United States, 340 U.S. 135, 139–40 (1950) (describing the FTCA's creation).

24. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

25. *Feres*, 340 U.S. at 139–40.

26. *Id.*

27. *Id.* These other claims included asserted violations of statutes surrounding a government procurement or a proposed procurement and an action brought by an interested party objecting to a solicitation for contract bids by the Federal Government. 28 U.S.C. § 1491(b)(1) (2012). Congress also allowed the courts to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." *Id.* § 1491(a)(2).

28. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946).

federal government for torts committed against them.[29] This included the right for military personnel to sue.[30] However, Congress provided a myriad of exceptions to the FTCA for which it would not waive its sovereign immunity, such as barring suit for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[31] This exception gave rise to the *Feres* Doctrine.

B. CREATING THE FERES *DOCTRINE*

In 1949, in *Brooks v. United States*, the Supreme Court considered its first case in which a service member sued the federal government under the FTCA.[32] In *Brooks*, a military vehicle negligently struck Brooks while he was driving off-base.[33] As a result, Brooks sued the government for damages under the FTCA.[34] The government based its defense on a literal reading of the FTCA.[35] Additionally, the government argued that allowing a service member to sue the government would have grave consequences because it would impose tort liability every time a commander made a poor battle decision or a defective jeep injured someone.[36] The Court rejected this argument and refused to adopt a literal reading of the FTCA.[37] Instead, the Supreme Court allowed Brooks to sue because the Court determined that the automobile accident was unrelated to Brooks' military career.[38]

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29. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946). The FTCA gave the federal district courts jurisdiction to hear the cases. 28 U.S.C. § 1346(b).

30. *See* Federal Tort Claims Act § 403(a); *id.* § 402 ("As used in this title, the term . . . 'Employee of the Government' includes officers or employees of any Federal agency, members of the military or naval forces of the United States . . . .").

31. *Id.* § 421(j). The statute contains twelve exceptions, including:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency . . . .
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> . . . .
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> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Id. § 421.

32. Brooks v. United States, 337 U.S. 49, 50 (1949).

33. *Id.*

34. *Id.*

35. *See id.* at 50–51.

36. *Id.* at 52.

37. *See id.* at 51 ("The statute's terms are clear. . . . We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" (quoting 28 U.S.C. § 2680(j))).

38. *Id.* at 52 ("[W]e are dealing with an accident which had nothing to do with the 'Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired.").

In 1950, the Court consolidated and heard three more cases arising under the FTCA—*Feres v. United States*, *Jefferson v. United States*, and *Griggs v. United States*.[39] Each case addressed a service member's ability to sue the military for tortious conduct.[40] All three cases dealt with negligence claims against the military and addressed whether the FTCA "extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."[41]

In deciding these cases, the Court adopted the *Feres* Doctrine, which provides "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[42] The Court considered the cases with the understanding that Congress provided few resources to help the Court interpret the FTCA.[43] However, it noted that Congress had the means to readily rectify the situation if it disagreed with the Court's decision.[44] The Supreme Court relied on three principle justifications for its decision.

First, the Court recognized that the FTCA reads, "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."[45] However, no parallel private liability exists for service members suing the federal government since no American law has ever permitted a soldier to recover against his superior officers or against the United States.[46]

Second, the Court pointed out the "distinctively federal" nature of the Government's relationship with service members.[47] It did not make sense to allow state law to govern the federal government's liability to service members for tort actions based on the service member's geographic location at the time of the incident, something over which the service member has no control.[48]

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39. Feres v. United States, 340 U.S. 135, 136–38, 146 (1950) (describing the three cases addressed and providing the rationale for the *Feres* doctrine).

40. *See id.* at 136–38. In *Feres*, an off-duty service member died when the barracks he was sleeping in caught fire and burned down due to an allegedly defective heating plant. *Id.* at 137. In *Jefferson*, the plaintiff alleged a doctor negligently left a towel inside of him during an abdominal surgery. Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949). Finally, in *Griggs*, the plaintiff died due to allegedly negligent medical care. Griggs v. United States, 178 F.2d 1, 2 (10th Cir. 1949).

41. *Feres*, 340 U.S. at 138. The Court further stated that *Feres* was "the 'wholly different case' reserved from [the Court's] decision in" *Brooks* because each claimant sustained injuries while on active duty and not on furlough. *Id.* (citing *Brooks*, 337 U.S. at 52).

42. *See id.* at 146.

43. *Id.* at 138.

44. *See id.* (stressing that the Court was not certain that it had correctly interpreted the FTCA and Congress was free to amend the FTCA if it disagreed with the Court's interpretation).

45. *Id.* at 141 (quoting 28 U.S.C. § 2674 (1946)).

46. *Id.* However, in a subsequent case, the Court rejected *Feres*'s "parallel private liability" rationale. United States v. Brown, 348 U.S. 110, 112–13 (1954).

47. *Feres*, 340 U.S. at 143 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)).

48. *Id.* at 143–44. In *Feres*, the Court was concerned about the service member's lack of choice; however, subsequent cases have ignored the service member and focused on the military's

Third, the Court stressed the soldier's inability to spend time in a courtroom, the inability to locate witnesses, and a general lack of resources as reasons to prevent such tort actions.[49] This recognition had previously led Congress to pass what became the VBA in an effort to assist service members.[50] The Court focused on the fact that service members already have an avenue of relief under the VBA,[51] which provides service members with access to a "no fault" compensation system, "which provides generous pensions to injured servicemen."[52] As such, it did not make sense that Congress intended to allow service members to choose a form of recovery.[53]

Shortly after *Feres*, in *United States v. Brown*, the Court developed a fourth reason for the *Feres* Doctrine. This reason addressed the relationship between service members and their superiors.[54] The Court was concerned that imposing tort liability on the federal government would interfere with military discipline.[55] The Court noted that it bars claims under the *Feres* Doctrine because tort claims are the "type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[56] It further noted that the military is a "specialized society."[57]

Specifically, the "military constitutes a specialized community governed by a separate discipline from that of the civilian."[58] Moreover, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[59] In order to operate successfully, the military requires "instinctive obedience, unity, commitment, and esprit de corps."[60] The Court determined that obedience extends beyond following orders to also encompass "duty and loyalty to one's service and to one's country."[61] Moreover, civilian courts are not equipped to second-guess

need for uniformity in determining its liability. *See, e.g.*, Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977) (emphasizing that uniformity is necessary because a "[s]ignificant risk of accidents and injuries" accompanies moving men and equipment across the country and liability cannot depend on where an accident occurs).

49. *Feres*, 340 U.S. at 145.

50. 38 U.S.C. §§ 701–41 (1950) (codified as amended at 38 U.S.C. Part II (2012)) (establishing provisions for general benefits veterans will receive regardless of the cause of their respective injury).

51. *Feres*, 340 U.S. at 145.

52. *Stencel Aero Eng'g Corp.*, 431 U.S. at 671.

53. *Feres*, 340 U.S. at 145.

54. United States v. Brown, 348 U.S. 110, 113 (1954).

55. *Id.* at 112.

56. United States v. Shearer, 473 U.S. 52, 59 (1985) (emphasis omitted).

57. Parker v. Levy, 417 U.S. 733, 743 (1974).

58. *Id.* at 744 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

59. *Id.* (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

60. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

61. United States v. Johnson, 481 U.S. 681, 691 (1987). In *Johnson*, the decedent was a U.S. Coast Guard helicopter pilot dispatched on a rescue mission. *Id.* at 683. During the rescue

military decisions.[62] With each subsequent case, courts have relied more heavily on *Brown's* military discipline justification, resulting in it becoming the primary basis for the *Feres* Doctrine.[63] Since its inception, the *Feres* Doctrine is generally treated as a matter of justiciability and constitutes a lack of subject-matter jurisdiction.[64] As such, courts do not get to hear the case on its merits.

C. EXPANDING FERES

As the *Feres* Doctrine has developed, its reach has expanded. Meanwhile, in similar contexts not affecting the military, the Court has narrowly construed exceptions to the FTCA.[65] The *Feres* Doctrine, however, has become so broad that it includes "all injuries suffered by" service members "that are even remotely related" to their military status.[66] A service member does not even need to be the cause of the injury.[67] Expanding the *Feres* Doctrine's scope, in *United States v. Johnson*, the Supreme Court prevented a service member from bringing a tort action even when a civilian caused his injuries instead of another service member.[68] The Court determined that the only thing that mattered was the status of the individual suffering the injury; the tortfeasor's status is irrelevant.[69] The Court further stretched the *Feres* Doctrine by pointing out that "a suit based upon service-related activity necessarily implicates the military['s] judgments and decisions."[70] This expanded the *Feres* Doctrine to include activities, such as horse-back riding[71] or boating,[72] which are considered service-related, but most people would not think of as implicating military judgments and decisions.[73] In addition, third parties are barred from bringing suit, either directly or indirectly, on behalf of a service member injured incident to service.[74] Due to the *Feres* Doctrine's numerous limitations, appellate courts have acknowledged that "practically

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mission, the pilot ran into bad weather, so he radioed to civilian air traffic controllers for assistance. *Id.* Due to the air traffic controllers' erroneous directions, the decedent flew into the side of a mountain. *Id.*

62. *Id.* at 690–91.

63. *See id.* at 686, 691–92.

64. Morris v. Thompson, 852 F.3d 416, 419–20 (5th Cir. 2017).

65. *See* United States v. Muniz, 374 U.S. 150, 159–62 (1963) (comparing federal prisoners to service members and determining that federal prisoners have the right to recover under the FTCA for actions committed by prison authorities).

66. Pringle v. United States, 208 F.3d 1220, 1223–24 (10th Cir. 2000) (emphasis omitted) (quoting Persons v. United States, 925 F.2d 292, 296 n.7 (9th Cir. 1991)).

67. *See id.* at 1224.

68. *See Johnson*, 481 U.S. at 691–92.

69. *Id.* at 689.

70. *Id.* at 691.

71. Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1138 (4th Cir. 1975).

72. McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007).

73. *See id.* at 1096–97 ("It is true that Lt. McConnell's activities were purely recreational . . . but this does not mean that they were unrelated to his military status.").

74. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

any suit that 'implicates the military judgments and decisions,' runs the risk of colliding with *Feres*."[75]

The *Feres* Doctrine's trend "has been guided by an increasing sense of awe for things military."[76] In *Shearer*, the Supreme Court concluded that civilian courts are not in a position to "second-guess military decisions."[77] Specifically, courts may not second-guess decisions regarding "the discipline, supervision, and control of a serviceman."[78] This includes instances in which the plaintiff is raising a *Bivens* action.[79] In applying the *Feres* Doctrine to *Bivens* actions, the Court expanded *Feres* to bar actions brought by service members challenging their superior officer's decisions because the hierarchical structure of the military required it.[80] A year later, the Court stretched the *Feres* Doctrine further by determining no officer-subordinate relationship was necessary for *Feres* to apply.[81] Since then, several circuit courts have interpreted the *Feres* Doctrine to bar even claims brought directly under state law.[82] The notion that nearly any suit implicating military judgment will collide with *Feres* has resulted in the appellate courts begrudgingly following an ever-expansive version of the *Feres* Doctrine.[83]

D. CIRCUIT SPLIT ON INTENTIONAL TORTS

Several Circuits have recognized that *Feres* bars intentional torts claims just as readily as it bars simple negligence claims.[84] Yet, other Circuits have

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75. Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *Johnson*, 481 U.S. at 691).

76. *Id.*

77. United States v. Shearer, 473 U.S. 52, 57 (1985).

78. *Id.* at 58.

79. *See* Chappell v. Wallace, 462 U.S. 296, 297–98 (1983). In *Chappell*, enlisted sailors brought an action against their commanding officer for discrimination. *Id.* Although *Bivens* will not be discussed in this Note, it is important to mention it here briefly because the Court has used the *Feres* doctrine to prevent service members' *Bivens* claims against their superior officers. *Id. Bivens* actions allow an individual to demonstrate that a federal officer has violated their constitutional rights. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395 (1971).

80. *Chappell*, 462 U.S. at 300.

81. United States v. Stanley, 483 U.S. 669, 683–84 (1987). The Court rejected the plaintiff's claims on both *Feres* and *Bivens*' grounds. *Id.*

82. *See, e.g.*, Morris v. Thompson, 852 F.3d 416, 419–20 (5th Cir. 2017) (describing how the Fifth Circuit has always barred state law claims under the *Feres* Doctrine); John v. Sec'y of Army, 484 F. App'x 661, 663–64 (3d Cir. 2012) (explaining that state law claims are barred because they have the same potential as federal claims to implicate military decisions); De Font v. United States, 453 F.2d 1239, 1240 (1st Cir. 1972) ("The mere fact that the cause of action is not derivative under local law, but is an original and distinct cause of action . . . does not remove it from the prohibition of *Feres*.").

83. *See, e.g.*, Persons v. United States, 925 F.2d 292, 299 (9th Cir. 1991) ("It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*, its direct offspring, or its more distant offshoots regarding 'derivative' non-military claims.").

84. *See, e.g.*, Day v. Mass. Air Nat'l Guard, 167 F.3d 678, 683 (1st Cir. 1999) (determining that the *Feres* Doctrine bars intentional tort claims the same as it bars negligent tort claims);

declined to extend *Feres* to bar suits for intentional torts.[85] The Supreme Court has never answered this question. Moreover, courts have used *Feres* to shield service members from tort liability in suits between service members, "recognizing an 'intramilitary immunity' from suits based on injuries sustained incident to service."[86] Likewise, the Supreme Court has remained silent on whether a service member tortfeasor is shielded from liability for his actions. Of particular importance to this Note, the Supreme Court has never addressed whether the *Feres* Doctrine bars intentional torts, such as intentional infliction of emotional distress or sexual harassment, which are not listed with the barred intentional torts in the FTCA.[87]

In *Mackey v. United States*, the Sixth Circuit determined the *Feres* Doctrine barred a sexual harassment claim,[88] which is an intentional tort that the FTCA does not expressly prohibit.[89] Regardless, the Sixth Circuit decided to join other circuits in determining the *Feres* Doctrine extends beyond negligent acts and encompasses intentional torts as well.[90] In reaching its decision, the court relied extensively on the military discipline factor laid out in *Brown*.[91] It did not matter that the plaintiff alleged an intentional tort rather than negligence because the court would still need to question military decisions.[92] It also did not matter that sexual harassment claims are not explicitly barred by the FTCA.[93] Moreover, the court decided that the need for deference to military

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Mollnow v. Carlton, 716 F.2d 627, 628 (9th Cir. 1983) (deciding that the common-law intentional tort claims were properly dismissed alongside the negligent tort claims).

85. *See, e.g.*, Cross v. Fiscus, 830 F.2d 755, 757 (7th Cir. 1987) (refusing to extend protections to intentional tortfeasors in the intra-military context).

86. Bowen v. Oistead, 125 F.3d 800, 804 (9th Cir. 1997) (quoting Lutz v. Sec'y of the Air Force, 944 F.2d 1477, 1480–81 (9th Cir. 1991)); *see also* Hefley v. Textron, Inc., 713 F.2d 1487, 1490–92 (10th Cir. 1983) ("In decisions both preceding and following *Stencel*, courts have routinely ruled that the protection of the *Feres* doctrine extends to officers and other servicemen, as well as to the United States."); Stanley v. CIA, 639 F.2d 1146, 1152 (5th Cir. 1981) ("The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship."); Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975) ("This is the immunity of one serviceman from suit by another, recognized by the Supreme Court in *Feres* . . . .").

87. *See generally* 28 U.S.C. § 2680(h) (2012) (failing to include both IIED and sexual harassment in its list of barred intentional torts).

88. Mackey v. United States, 226 F.3d 773, 776 (6th Cir. 2000). In *Mackey*, the plaintiff alleged that her superior officers made inappropriate sexual advances toward her and sexually harassed her. Mackey v. Milam, 154 F.3d 648, 649 (6th Cir. 1998). The sexual harassment included her superiors staring at her breasts, making comments about her appearance while in uniform, and making sexual comments about her. *Id.*

89. *See* 28 U.S.C. § 2680(h).

90. *Mackey*, 226 F.3d at 776 ("We join with the other United States Courts of Appeals that have addressed the issue and hold that the *Feres* doctrine applies to intentional torts.").

91. *Id.* at 775.

92. *Id.* at 775–76.

93. *See id.* at 776–77 (pointing to the government's argument that Mackey could look to the Uniform Code of Military Justice ("UCMJ") for a remedy and other programs established through the Armed Forces and the Veterans Administration).

discipline outweighs the public interest in preventing intentional torts.[94] Lastly, the court determined that Congress intended for the plaintiff to rely on other statutory means of recovery provided to injured service members.[95]

In another case, the Sixth Circuit posited that the Supreme Court's precedent demonstrated a desire to broaden the *Feres* Doctrine to include any injury suffered by a service member that is remotely related to the individual's status as a service member, regardless of the location of the incident or the status of the tortfeasor.[96] No nexus is required "between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose."[97] In *Lovely v. United States*, the Sixth Circuit interpreted the *Feres* Doctrine to bar the plaintiff's intentional tort claim for IIED, despite it not being listed in 28 U.S.C. § 2680(h), because the court determined that the *Feres* Doctrine covers more than soldiers following orders.[98]

In an unpublished opinion, the Tenth Circuit determined the *Feres* Doctrine barred the plaintiff's claims under the FTCA for gender bias and sexual harassment, as well as for unwanted sexual advances by a fellow student, none of which are intentional torts listed under 28 U.S.C. § 2680(h).[99] Under a similar line of reasoning as the Sixth Circuit used, the Tenth Circuit determined that the *Feres* Doctrine bars all tort claims which arise "incident[al] to military service" regardless of their intentionality.[100] The Tenth Circuit further noted that in a previous unpublished opinion, it had determined that the *Feres* Doctrine barred a former Air Force member's claims of sexual harassment as "incident[al] to service."[101] In reaching its decisions, the Tenth Circuit relied on *Brown*'s prohibition on second-guessing military decisions.[102]

Several circuits have further immunized service members from tort liability even when the tortfeasor is not a superior to the tort victim but is still exercising some level of military responsibility. These circuits have expanded the *Feres* Doctrine to encompass coworkers,[103] civilian stable operators,[104] and

94. *Id.*

95. *Id.* at 777.

96. Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987).

97. *Id.*

98. Lovely v. United States, 570 F.3d 778, 779 (6th Cir. 2009).

99. Morse v. West, No. 97–1386, 1999 WL 11287, at *4 (10th Cir. Jan. 13, 1999).

100. *Id.*

101. Corey v. United States, No. 96–6409, 1997 WL 474521, at *5 (10th Cir. Aug. 20, 1997).

102. *Id.* at *4.

103. *See* Stauber v. Cline, 837 F.2d 395, 396 (9th Cir. 1988) (barring plaintiff's claims against his coworkers for IIED and libel).

104. Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1139 (4th Cir. 1975) (barring plaintiff's suit against civilian stable operators for his horseback riding injury).

service members of the same rank,[105] in an attempt to prevent civilian courts from second–guessing military decisions.[106] A typical application of the *Feres* Doctrine appeared in *Morris v. Thompson*. In *Morris*, the Fifth Circuit dismissed a case in which the defendant allegedly grabbed the plaintiff by the throat and slammed her to the ground.[107] The court determined that the intentionality of the action did not matter under the *Feres* Doctrine because the plaintiff's injury stemmed from her military service.[108]

Contrary to those circuits, the Seventh Circuit refused to apply the *Feres* Doctrine to tort litigation between individual service members regardless of the nature of the tort action.[109] Similarly, the Tenth Circuit has treated immunity from suits between individual service members differently from "true *Feres* cases" and determined that those cases must be analyzed using a different standard.[110] That court has held that a suit between service members is different because the plaintiff is not directly suing the military.[111] The Tenth Circuit has determined the correct standard for cases that are not "true *Feres* cases" is a case-by-case analysis to decide whether the *Feres'* rationales are present to bar an action under the FTCA by one service member against another service member.[112] In breaking with its sister circuits, the Tenth Circuit pointed out that courts have generally barred intra-military claims to "preserv[e] the harmonious relationships within the military establishment."[113] The court emphasized that the *Feres* Doctrine was never intended to shield service members whose actions do not implicate the military's function.[114]

105. Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969) (explaining that it did not matter that the service member causing the injury and the injured service member are of the same rank).

106. Durant v. Neneman, 884 F.2d 1350, 1352 (10th Cir. 1989).

107. Morris v. Thompson, 852 F.3d 416, 418 (5th Cir. 2017).

108. *Id.* at 418–19.

109. Cross v. Fiscus, 830 F.2d 755, 757 (7th Cir. 1987). In *Cross*, three enlisted Marines complained about their regiment's commanding officer. *Id.* at 755. As a result, the commanding officer was removed from his position. *Id.* In response, the commanding officer sued the three Marines in civilian court for defamation. *Id.*

110. *Durant*, 884 F.2d at 1354 n.5.

111. *See id.* at 1352 ("[I]t cannot be said accurately these are true *Feres* cases because the claims asserted are not founded upon the FTCA and the liability of the United States is not implicated.").

112. *See, e.g.*, Stauber v. Cline, 837 F.2d 395, 396–97 (9th Cir. 1988) (explaining that defendants were plaintiff's coworkers); Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1139 (4th Cir. 1975) (stating that defendants were civilian employees who operated a stable for military purposes); Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969) (noting that the defendant was a fellow service member driving the truck).

113. *Durant*, 884 F.2d at 1353.

114. *Id.* ("[T]his zone was never intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military.").

E. CRITICISMS OF THE FERES *DOCTRINE*

Numerous courts have criticized the *Feres* Doctrine.[115] Despite the different factors put forth by the Supreme Court, the circuit courts have acknowledged the extent to which any given factor applies is an open question.[116] Some circuits stress that the Court requires an examination of all three criteria put forth in *Feres* while other circuits rely almost exclusively on the military discipline factor.[117] Meanwhile, other circuits have merged the factors together to reach an "incident to service test,"[118] which in substantial part asks whether military discipline will be impacted.[119] From its inception, the *Feres* Doctrine's application has only continued to broaden[120] and courts have consistently criticized the doctrine's existence.[121] Furthermore, courts have acknowledged that the doctrine's expansion in numerous different directions has made it difficult to know how to apply it.[122] The Second Circuit characterized *Feres* as "an extremely confused and confusing area of law."[123] In *Johnson*, four justices joined in a heated dissent in which Justice Scalia penned "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[124] Regardless, the majority decided to follow *Feres*.[125] Since *Johnson*, the criticism for *Feres* has not diminished and has likely increased.[126] However, despite the criticisms, the Supreme Court

115. *See, e.g.*, Selbe v. United States, 130 F.3d 1265, 1266 (7th Cir. 1997) ("The *Feres* doctrine, as it has come to be called, has been criticized both in judicial opinions and in academic commentaries." (citations omitted)); Estate of McAllister v. United States, 942 F.2d 1473, 1480 (9th Cir. 1991) ("[W]e follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine.").

116. Ortiz v. United States *ex rel.* Evans Army Cmty. Hosp., 786 F.3d 817, 821–22 (10th Cir. 2015).

117. Ricks v. Nickels, 295 F.3d 1124, 1127–29 (10th Cir. 2002).

118. *Ortiz*, 786 F.3d at 822.

119. *Id.* at 822–23.

120. *See, e.g.*, Persons v. United States, 925 F.2d 292, 295–96 (9th Cir. 1991) (denying recovery for a service member's family who allegedly did not receive adequate counseling after the service member committed suicide); Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987) (denying recovery for a service member's family who sued after the plaintiff died in a car accident on base).

121. *See, e.g.*, Taber v. Maine, 67 F.3d 1029, 1043 (2d Cir. 1995) ("[T]he lower courts have found the [*Feres*] rationales other than discipline extremely difficult to apply in a coherent manner."); Peluso v. United States, 474 F.2d 605, 606 (3d Cir. 1973) ("If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service.").

122. *Taber*, 67 F.3d at 1038.

123. *Id.*

124. United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

125. *Id.* at 692.

126. *See, e.g.*, Purcell v. United States, 656 F.3d 463, 465 (7th Cir. 2011) ("The *Feres* doctrine . . . is certainly not without controversy. . . . and has also been widely criticized."); Costo v. United States, 248 F.3d 863, 866–67 (9th Cir. 2001) (expressing regret, but an obligation to follow the

has not directly addressed *Feres* since *Johnson*.[127] One of the areas of law in which the *Feres* Doctrine's shortcomings are most apparent is dealing with sexual offenses.

F. CONCERNS SURROUNDING SEXUAL HARASSMENT AND FERES

The court system's unwillingness to second-guess military decisions ignores a history of sexual harassment issues in the military. When the Service Woman's Action Network surveyed over 1,300 women regarding their service's impact on their mental health,[128] thirty percent reported Military Sexual Trauma as the number one factor negatively impacting their well-being.[129] Moreover, more than 60% of the women surveyed indicated a negative impact on their mental health due to their military service generally.[130] This negative impact has led to higher rates of depression among female members of the military compared to non-veteran women.[131] Moreover, the suicide rate amongst female veterans is more than double that of civilian women.[132] Worse yet, when these women sought mental health treatment, they reported being harassed by other veterans.[133]

In the midst of these statistics, the military has preached "zero tolerance" for sexual harassment; however, such statements haven't protected troops.[134] The U.S. military has been struggling with how to address sexual harassment issues for more than 25 years.[135] As recently as 2017, the Marine Corp found itself plagued with a photo sharing scandal in which Marines were caught "sharing sexually explicit photos of female Marines online."[136] This scandal

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Supreme Court's precedence in finding *Feres* barred the plaintiff's claim); Cutshall v. United States, 75 F.3d 426, 429 (8th Cir. 1996) (describing the criticism the *Feres* Doctrine has received).

127. *Purcell*, 656 F.3d at 466.

128. Antonieta Rico, *Why Military Women Are Missing from the #MeToo Moment*, TIME (Dec. 12, 2017), http://time.com/5060570/military-women-sexual-assault.

129. Press Release, Service Women's Action Network, Service Women Identify Sexual Assault, Not Deployment, As Number One Factor That Negatively Affects Their Mental Wellness (Nov. 10, 2017), https://www.servicewomen.org/press-releases/media-advisory-service-women-identify-sexual-assault-not-deployment-as-number-one-factor-that-negatively-affects-their-mental-wellness.

130. Rico, *supra* note 128.

131. *Id.*

132. *Id.*

133. *Id.*

134. Scott Jensen, *Sexual Assaults in the Military Create a New #MeToo Battalion Every Week. That Must Stop.*, USA TODAY (Jan. 9, 2018, 1:58 PM), https://www.usatoday.com/story/opinion/2018/01/09/battalion-week-gets-sexual-assaulted-our-military-thats-unsafe-them-and-us-scott-jensen-column/1014831001.

135. Lawrence Korb, *Time for America's Military to Face its Own Problem of Sexual Assault*, HILL (Nov. 3, 2017, 2:00 PM), http://thehill.com/opinion/civil-rights/358659-time-for-americas-military-to-face-its-own-problem-of-sexual-assault.

136. Chelsea Bailey, *Marine Sentenced After Pleading Guilty in Nude Photo Scandal*, NBC NEWS (July 11, 2017, 1:07 PM), https://www.nbcnews.com/news/us-news/marine-sentenced-after-pleading-guilty-nude-photo-scandal-n781791.

led to an investigation into more than eighty marines and exposed a culture of sexual harassment.[137] One Marine received a sentence of ten days; however, the vast majority were not criminally prosecuted.[138] Since the *Feres* Doctrine immunizes the military from tort liability, the victims of the photo scandal were left without any recourse. However, *Feres* will remain the law until Congress or the Supreme Court decides to step in and address the confusion.

III. FAULTY RATIONALE LEADING TO MAJOR CIRCUIT CONFUSION

This section first acknowledges the importance of "good order" and discipline; however, it emphasizes that claims under the *Feres* Doctrine, particularly those for intentional torts, do not implicate "good order and discipline." Second, this section focuses on the misconception that permitting recovery under the *Feres* Doctrine will permit service members to receive double compensation for their injuries. Third, this section discusses the perceived inequities in amending the *Feres* Doctrine and how the current regime is inequitable. Lastly, this section considers the issues that arise from ignoring the FTCA's plain meaning and blindly applying the *Feres* Doctrine's rationales, which leaves intentional tort victims with no recourse.

A. MILITARY DISCIPLINE RATIONALE

Section one starts by exploring the history and importance of "Good Order and Discipline". Then Section two addresses the erroneous belief that permitting suits for intentional torts will negatively impact "Good Order and Discipline."

1. "Good Order and Discipline's" Historical Underpinnings

The Supreme Court's reluctance to allow courts to intervene in military affairs is well founded because "good order and discipline" is essential to the military's ability to function properly. Likewise, "[d]iscipline, morale, and unit cohesion are the hallmarks of an effective fighting force."[139] The importance of discipline is "[a]s old as armies and navies."[140]

137. *Id.*

138. *See* Leo Shane III, *Congress Advances New Sexual Assault, Harassment Rules for the Military*, MIL. TIMES (Nov. 26, 2017), https://www.militarytimes.com/news/pentagon-congress/2017/11/26/congress-advances-new-sexual-assault-harassment-rules-for-the-military.

139. *The* Feres *Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 5 (2002) (statement of Christopher E. Weaver, Rear Admiral and Commandant, Naval District) [hereinafter *An Examination*].

140. JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 3 (1974) (explaining that service members have had fewer rights for as long as there have been militaries).

Sun Tzu,[141] one of history's greatest generals, listed the enforcement of discipline as one of the five factors to predict military success.[142] Thucydides[143] noted, "nothing contributes so much to the credit and safety of an army as the union of large bodies by a single discipline."[144] Machiavelli[145] further recognized that military discipline is essential to achieve good training.[146] All three individuals recognized the difficulties associated with an undisciplined military.

In leading the United States, George Washington noted, "[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all."[147] The importance of "good order and discipline" remains the same in the modern military. He recognized that few things impact the military's ability to effectively engage in combat more than "good order and discipline."[148] Likewise, disciplinary sanctions in military

141. Sun Tzu served as a Chinese military general and is considered one of the greatest "war leader[s] and strategist[s]." Eric Jackson, *Sun Tzu's 31 Best Pieces of Leadership Advice*, FORBES (May 23, 2014, 12:10 PM), https://www.forbes.com/sites/ericjackson/2014/05/23/sun-tzus-33-best-pieces-of-leadership-advice. His philosophy to be a great leader is summed up in thirty-three pieces of advice. *Id.*

142. SUN-TZU, THE ART OF WAR 167 (Ralph D. Sawyer & Mei-chün Lee Sawyer trans., 1994). The Art of War was originally published around the Fifth Century B.C. and has profoundly impacted "military strategy over the past two thousand years." *The Art of War*, COLUM. U. PRESS (2009), https://cup.columbia.edu/book/the-art-of-war/9780231133821.

143. Thucydides lived in the Fourth Century B.C. and served as a Greek general in the Peloponnesian War. Arnold Wycombe Gomme, *Thucydides*, ENCYCLOPEDIA BRITTANICA (Feb. 8, 2018), https://www.britannica.com/biography/Thucydides-Greek-historian#ref7242. He is considered one of the greatest Greek historians of all time. *Id.*

144. THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR CHAPT. VI (Richard Crawley trans., 2013), http://www.gutenberg.org/files/7142/7142-h/7142-h.htm#link2HCH0006 (describing the need for discipline in a military if it is going to be successful).

145. Niccolo Machiavelli lived in the Fifteenth and Sixteenth Centuries A.D. and served as an Italian political philosopher and statesman. Harvey Mansfield, *Niccoló Machiavelli*, ENCYCLOPEDIA BRITTANICA, https://www.britannica.com/biography/Niccolo-Machiavelli (last visited Sept. 12, 2018). He served as the head of the second chancery, which placed him in charge of foreign affairs. *Id.* He organized the first militia in 1505. *Id.*

146. *See generally* NICCOLLO MACHIAVELLI, 2 THE ART OF WAR (Ellis Farneworth trans., 2000), http://www.yama-dojo.ca/resources/Machiavelli%20-%20Art%20Of%20War.pdf (explaining that it is insufficient for a military to be in better shape or better equipped than its enemy if it does not also possess discipline).

147. George Washington, *Instructions to Company Captains, 29 July, 1757*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/02-04-02-0223 (last visited Oct. 26, 2018) (stressing to his officers that discipline is necessary for a military to function). Washington likely did not read Machiavelli; however, he was likely familiar with his ideas due to Machiavelli's prominence. RICHARD BROOKHISER, GEORGE WASHINGTON ON LEADERSHIP 159 (2008) (describing how Washington must have been aware of Machiavelli's writings due to him being so well known).

148. Richard C. Harding, *Foundational Leadership*, 37 REP. 4, 9–10 (2010).

codes centered around "good order and discipline" infractions emphasize its importance.[149]

Under medieval law, the king or commander exercised unlimited powers of discipline over his troops.[150] The solution to disciplinary issues "could rang[e] from fines and ignominious expulsion from the [military] . . . to loss of a hand, and burial alive."[151] Today, the military has moved away from the death penalty.[152] Instead, the Uniform Code of Military Justice ("UCMJ") provides a range of punishments for actions which detract from "good order and discipline."[153]

A code of military justice's main function is to enforce discipline.[154] The military has its own code because, like the Supreme Court, most of society recognizes the military as a separate society.[155] The Supreme Court noted that military law has its own jurisprudence, which exists separately from the law that governs the rest of the federal judiciary.[156] In turn, Congress has put procedures in place, within the military, absent from civilian society, to reinforce the military's need for discipline.[157] Throughout the *Feres* progeny, the Court has consistently deferred to the need for military discipline in refusing to question military decisions.[158]

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149. 10 U.S.C. § 934 (2012) ("Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be punished at the discretion of th[e] court."). Section 934 is also known as UCMJ art. 134, which is used to punish everything else not specifically enumerated as an offense elsewhere in the UCMJ. *See id.*; JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS MARTIAL UNITED STATES art. 134, ¶ 60 (2016).

150. BISHOP, JR., *supra* note 140, at 3–4.

151. *Id.*

152. *The U.S. Military Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/us-military-death-penalty (last visited Sept. 12, 2018) (explaining that the military has not executed anyone since 1961).

153. 10 U.S.C. § 934. Charges ranging from Indecent Language to Child Pornography and Negligent Homicide are included in this catchall for issues that could implicate "good order and discipline." JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 149, art. 134, ¶¶ 68b, 85, 89.

154. LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 3 (2010) (describing the balance between ensuring discipline and providing adequate protections to service members).

155. *Id.*

156. Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . .").

157. *See id.*

158. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 304 (1983) (describing potential problems with letting service members sue their superiors); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953) ("[J]udges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.").

2. *Feres*'*s* Negative Impact on "Good Order and Discipline"

The military fears that allowing service members to sue the military will cause commanders to be more timid in their actions for fear they will be sued if someone is injured.[159] Meanwhile, commanders need to focus on training their troops for operational readiness instead of focusing on tort liability.[160] This recognizes that "[m]ilitary justice is virtually inseparable from military discipline which" is necessary for meeting the military's objectives and requires that service members be "prepared for death, if necessary."[161] Contrarily, "[o]ur civilian justice system aims primarily to safeguard the rights of . . . the individual."[162]

The problem with citing concerns about infringing upon "good order and discipline" is that numerous FTCA claims barred by *Feres* do not implicate military discipline concerns.[163] Similarly, in other contexts, military leaders have often cited "good order and discipline" concerns to oppose reforms "whenever it has been presented with a new requirement proposed by elected officials."[164] One Congresswoman even called the military out on this trend and said, "[w]hen we wanted women to be able to serve in the military . . . . [and] [w]hen we integrated the armed services, commanders said you cannot possibly do this; it will undermine good order and discipline. We did it."[165] Yet, with each reform that occurs, the military has repeatedly acknowledged that these concerns were unfounded.[166]

Furthermore, the government's concerns about prohibiting suits in the name of "good order and discipline" run afoul of the notion that good order also impacts unit cohesion and morale.[167] Yet, denying service members who are suffering from sexual harassment a means of recourse negatively impacts "good order and discipline."[168] Service members often report a breakdown in

159. *An Examination*, *supra* note 139, at 7–8 (statement of Paul Harris, Deputy Associate Attorney General, Department of Justice).

160. *Id.* at 5 (statement of Christopher E. Weaver, Rear Admiral and Commandant, Naval District) (describing the need for commanders to focus on operational tasks rather than focus on tort liability); *id.* at 10 (statement of John Altenburg, Major General (Retired), Former Assistant Judge Advocate General, U.S. Army) (explaining his concern that allowing suits will undermine "good order and discipline").

161. 1 JONATHAN LURIE, ARMING MILITARY JUSTICE xv (1992).

162. *Id.*

163. *An Examination*, *supra* note 139, at 14–15 (statement of Eugene R. Fiddell, Counsel, Feldesman, Tucker, Leifer, Fidell and Bank, LLP).

164. Steve Chapman, *Military Brass Play Same Old Song: Resisting Measures to Combat Sexual Assault*, CHI. TRIB. (July 25, 2013), http://articles.chicagotribune.com/2013-07-25/news/ct-oped-0725-chapman-20130725_1_sexual-assault-commanders-other-service-chiefs.

165. 159 CONG. REC. 17,119 (2013) (statement of Sen. Gillibrand).

166. Chapman, *supra* note 164.

167. RICHARD S. SIEGFRIED ET AL., THE SECRETARY OF THE ARMY'S SENIOR REVIEW PANEL ON SEXUAL HARASSMENT 62 (1997).

168. *Id.* at 60.

unit cohesion when there are sexual harassment issues in the unit.[169] In an interview, one service member noted that sexual harassment segregates the unit between males and females.[170] Another service member pointed out "you can't work with someone you feel you have to defend yourself against."[171] As such, the inability to sue places a greater burden on "good order and discipline" than the ability to sue would.

Moreover, allowing people to sue for intentional torts, specifically those torts not listed in § 2680(h) of the FTCA, will not pose a greater burden on "good order and discipline," nor will it implicate military command decisions more than actions which service members are already allowed to bring against the government.[172] Counter to the government's concerns about impeding on military discipline, veterans can already sue under the Tucker Act to have their records corrected after "review of the decision of the boards for correction of military or naval records."[173] Yet, the military does not assert that these actions are unduly burdensome.[174] Chief Justice Warren wrote, "citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[175] However, *Feres* leaves victims of intentional torts without recourse because they chose to "doff[] their civilian clothes" in exchange for a military uniform.[176] In effect, *Feres* slams the courthouse door in the face of injured service members.[177]

Furthermore, if complying with the Federal Rules of Civil Procedure's discovery rules was too burdensome, then Congress would not have permitted service members to sue under other statutes, under which people have never questioned their right to sue.[178] Cases questioning a commander's decisions about military records are more likely to implicate military command decisions than cases arising under the *Feres* Doctrine because those cases require the courts to review a service member's records.[179] Despite being a

169. *Id.*

170. *Id.*

171. *Id.*

172. *See, e.g.*, Kidwell v. Dep't of the Army, Bd. for Correction of Mil. Records, 56 F.3d 279, 286–87 (D.C. Cir. 1995) (considering whether the military board which reviewed plaintiff's records decision should be altered or left alone).

173. *An Examination*, *supra* note 139, at 14 (statement of Eugene R. Fiddell, Counsel, Feldesman, Tucker, Leifer, Fidell and Bank, LLP); *see also* 5 U.S.C. Subchapter II (2012) (explaining the process for which a veteran can petition their respective service to have their military records corrected).

174. *An Examination*, *supra* note 139, at 14–15.

175. Earl Warren, *The Bill of Rights and The Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

176. *Id.*

177. Ann-Marie Woods, Note, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1331–32 (2014).

178. *See An Examination*, *supra* note 139, at 14–15 (statement of Eugene R. Fidell, Counsel, Feldesman, Tucker, Leifer, Fidell and Bank, LLP).

179. *See id.* at 14.

nuisance to commanders, these kinds of review are necessary to help ensure civilian control of the military.[180] Yet, none of these issues have been cited as a burden on military discipline or command decisions.[181] Likewise, issues arising from the *Feres* Doctrine do not implicate military discipline or command decisions.

B. COMPENSATION RATIONALE

The *Feres* Doctrine's second rationale is that every member of the military receives compensation for their injury under the VBA because they are in the military.[182] It is irrelevant whether the injury stemmed from tortious conduct by the military.[183] As such, the Supreme Court has reasoned that allowing individuals to sue the government would provide them with extra compensation in addition to their compensation under the VBA.[184]

The problem with the double compensation rationale is that it is not true in all instances.[185] The military compensation system is set up to only support the injured service member and the injured service member's dependents.[186] As such, if an injured service member is killed and has no dependents or if the military does not perceive the service member as injured, such as in the case of an IIED claim, no one will receive any compensation under the VBA, and the *Feres* Doctrine will bar a civil suit even though no one received compensation under the VBA.[187]

Family members often try to bring suits for "loss of consortium [and] mental anguish."[188] For example, in *O'Neill v. United States*, the plaintiff tried to sue the federal government for her daughter's death.[189] The plaintiff's daughter, Ensign O'Neill, was murdered by her ex-fiancé, Ensign Smith.[190]

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180. *Id.* at 15.

181. *Id.*

182. *See* Feres v. United States, 340 U.S. 135, 142–43 (1950).

183. *See id.*

184. *See generally* 38 U.S.C. §§ 701–41 (1950) (codified as amended at 38 U.S.C. Part II (2012)) (establishing provisions for general benefits veterans will receive regardless of the cause of their respective injury).

185. *See, e.g.*, Mackey v. United States, 226 F.3d 773, 776–77 (6th Cir. 2000) (denying any chance at recovery after court denied sexual harassment case).

186. *See* 38 U.S.C. Part II (describing that benefits go to the injured service member and their dependents). The VBA is silent on providing benefits when the deceased service member has no dependents and therefore the military does not provide any benefits. *See generally id.* (failing to mention provision of benefits when the deceased service member has no dependents).

187. *See, e.g.*, O'Neill v. United States, 140 F.3d 564, 564–65 (3d Cir. 1998) (rehearing denied) (not providing any recovery).

188. Richard S. Lehmann, Note, *The Effect of the* Feres *Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1244–45 (1982).

189. *See O'Neill*, 140 F.3d at 564–65.

190. *Id.* at 565 (Becker, C.J., dissenting). In arguing that the court should have reheard the case, Chief Judge Becker argued that *O'Neill* differed from *United States v. Shearer*, 473 U.S. 52

After killing O'Neill and her friend, Smith proceeded to kill himself, which left the family with no recourse criminally: the military could not charge a dead man.[191] Additionally, O'Neill's family did not receive any compensation from the government because they were not her dependents,[192] nor could they bring a suit against the government for her death because the *Feres* doctrine barred any potential claim as derivative to O'Neill's service.[193]

Similarly, in *Shearer v. United States*, the Supreme Court determined the *Feres* Doctrine barred Shearer's mother from suing because Shearer's injury arose incidental to his service.[194] In that case, the Court ignored the fact that there was no chance of Shearer's mother obtaining a double recovery when it prohibited her from recovering anything.[195] The government's double compensation concern proved to be unfounded, and allowing Shearer's mother to sue would have created the potential for her to recover something for her son's death.[196] Instead, the Supreme Court blindly applied its *Feres* rationale to *Shearer* and subsequent cases and determined that it no longer mattered whether an individual could recover in a specific instance.[197] Regardless, even in cases where a dependent is able to recover for the death of a loved one, they are limited to their loved one's death benefits.[198] Otherwise, the VBA precludes anyone other than a decedent's dependent from recovering anything.[199]

(1985), because O'Neill had a "purely personal" relationship with her attacker, whereas Shearer's relationship stemmed from his military relationship with his attacker. *Id.*

191. *Id.* at 565 n.**. Chief Judge Becker further posited that Smith likely would have killed O'Neill even if she had been a civilian. *Id.* at 565. He then quoted Justice Frankfurter to voice his displeasure with the *Feres* doctrine, noting, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Id.* at 566 (quoting Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949)).

192. *An Examination, supra* note 139, at 16–18. O'Neill did not have any children and her ex-fiancé killed her, which meant that her family members were not her dependents. *Id.*

193. *O'Neill*, 140 F.3d at 565.

194. *See* United States v. Shearer, 473 U.S. 52, 57–58 (1985) (ignoring where the incident occurred and determining whether the injury occurred "incident to service" based on whether the Court would have to second guess military decisions). *Id.* at 53–54. In *Shearer*, the military knew a service member had mental health issues and did nothing about it. *Id.* The mentally ill service member killed another service member. As a result, the deceased service member's mother tried to sue the military for her son's death. *Id.*

195. *Id.* at 58–59. The Court determined that the double compensation and equity rationales of the *Feres* doctrine were not necessary to the decision; rather, the focus was on military discipline. *Id.* at 57–58. However, the Court later reintroduced the double compensation and equity rationales as important. United States v. Johnson, 481 U.S. 681, 689–91 (1987).

196. *See Shearer*, 47 U.S. at 57–58 (eliminating the possibility of recovery by denying the petitioner's wrongful death claim).

197. *See id.* (explaining that the Court focuses on the military discipline factor).

198. Lehmann, *supra* note 188, at 1255 n.97.

199. The VBA provides: "The surviving spouse, child or children . . . of any veteran who died . . . as the result of injury or disease incurred or aggravated by active military, naval, or air service, in line of duty . . . shall be entitled to receive compensation . . . ." 38 U.S.C. § 1121 (2012).

Additionally, in cases dealing with intentional torts such as IIED that leave the victim with injuries invisible to the naked eye, the victim is left without any recovery because she is unable to get in the courthouse door. Chief Justice Taney noted, "it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer . . . without giving him redress in the courts of justice."[200] The Supreme Court even recognized this problem in *Brooks* when it refused to make the VBA the exclusive remedy to a service member's injury.[201] Yet, in subsequent cases such as *Shearer*, the Court ignored the inequities its decisions caused.[202]

C. EQUITY RATIONALE

The military and the courts are concerned that permitting individuals to sue the government for injuries connected to their military service will create inequities in the system because it will treat service members differently based on their geographic locations.[203] One such concern is that service members stationed in the United States will be permitted to recover while service members operating in a combat zone will not be permitted to recover under the FTCA.[204] However, this has never been considered a problem in other contexts.[205] One of Justice Scalia's main critiques in his *Johnson* dissent stemmed from the fact that prisoners are allowed to sue under the FTCA; however, they are also limited in their choice of geographic location.[206] Meanwhile, the *Feres* Doctrine eliminates the possibility of recovery for service members suffering from sexual harassment and other intentional torts, which the FTCA does not explicitly bar. In the meantime, there are service members in the military fighting on a battlefield all their own. Sexual harassment is a continued and persistent issue in the U.S. military despite various initiatives and three decades of research aimed at tackling the problem.[207]

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200. Dinsman v. Wilkes, 53 U.S. 390, 403 (1851).

201. *See* Brooks v. United States, 337 U.S. 49, 53 (1949) ("Unlike the usual workman's compensation statute, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy." (citation omitted)).

202. *See Shearer*, 47 U.S. at 57–58.

203. *An Examination*, *supra* note 139, at 10 (statement of Nolan Sklute, Major General (Retired), Former Judge Advocate General, U.S. Air Force) (explaining his equity concern that service members stationed in the United States would be able to recover, but those deployed could not recover because the FTCA does not apply overseas).

204. *Id.*

205. *See* United States v. Muniz, 374 U.S. 150, 152 (1963) (determining that federal prisoners are free to sue under the FTCA).

206. United States v. Johnson, 481 U.S. 681, 696 (1987) (Scalia, J., dissenting).

207. Richard J. Harris et al., *Sexual Harassment in the Military: Individual Experiences, Demographics, and Organizational Contexts*, 44 ARMED FORCES & SOC'Y 25, 26 (2017). Sexual harassment is defined as a form of harassment

In 2013, President Obama warned the armed services that he had no tolerance for sexual offenders in the military.[208] Likewise, Congress expressed a lack of patience for the culture of sexual harassment and assault in the armed forces.[209] The Joint Chiefs of Staff appeared before Congress and acknowledged the military has a sexual harassment problem that has been ignored for years.[210] The military promised Congress and the American public that it would no longer tolerate sexual harassment.[211] However, it has consistently demonstrated an inability to do so, and sometimes a resistance to changing its culture.[212] For example, in some instances, the military chooses not to court martial senior ranking service members for sexual harassment even when the evidence against the service member seems overwhelming.[213] These decisions leave victims without any recourse because the *Feres* Doctrine bars any civil claims the tort victim may bring against the military and the military has chosen not to prosecute the perpetrator.

In the civilian context, Congress allowed individuals to take matters into their own hands and bring suits against their sexual harassers.[214] This decision made a difference because it cost companies money when employees were

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> that (A) involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when–
>
> (i) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;
>
> (ii) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
>
> (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment; and
>
> (B) is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

10 U.S.C. § 1561 (2012).

208. Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, WASH. POST (May 7, 2013), https://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html.

209. *Id.*

210. Craig Whitlock, *How the Military Handles Sexual Assault Cases Behind Closed Doors*, WASH. POST (Sept. 30, 2017), https://www.washingtonpost.com/investigations/how-the-military-handles-sexual-assault-cases-behind-closed-doors/2017/09/30/a9df0682-672a-11e7-a1d7-9a32c91c6f40_story.html.

211. *Id.*

212. *See, e.g.*, *id.* (explaining how commanders can choose to not court martial individuals even when there is sufficient evidence to court-martial); Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html (describing how senior service members often avoid being court-martialed for sexual harassment or assault or receive clemency if they are court-martialed).

213. *See, e.g.*, Whitlock, *supra* note 210 ("This kind of case cries out to be court-martialed.").

214. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

harassed or assaulted.[215] Service members face the same issues as civilians when the command system does not work as it is supposed to, leaving subordinates in a vulnerable position.[216] The civilian system strikes a balance, which does not exist in the military system, between "workers' needs [and] legitimate business concerns."[217] Employers are held civilly liable if they abuse their authority.[218] As such, they are provided an economic incentive to eliminate sexual harassment in the workplace.[219]

However, the military does not have the same incentive. Service members are not able to sue the military when they are sexually harassed. Instead, service members are left hoping the military will decide to prosecute their case, during which they are held to the "beyond a reasonable doubt" standard used in criminal cases rather than the "preponderance of the evidence" standard used in civil cases.[220] Without evidence, service members are left waiting and hoping nothing worse than sexual harassment occurs.

As previously noted, in FY 2016, the military found that "the Military Services and the National Guard Bureau ("NGB") received and processed 601 sexual harassment complaints."[221] These instances of sexual harassment lead to other issues that can contribute to the military's success, or lack thereof, such as "career interruptions, lowered productivity, . . . and loss of commitment to work and employer."[222] Additionally, workers who are sexually harassed tend to have "worse psychological and physical health, higher absenteeism . . . and a higher likelihood of quitting one's job."[223] This comes at a time where the military is already facing a critical manning shortage.[224] It cannot afford to lose qualified individuals due to a hostile work

215. Maia Goodell, *Military Rape Prosecutions Won't Work*, CNN (last updated May 16, 2013, 11:14 AM), https://www.cnn.com/2013/05/16/opinion/goodell-military-rapes/index.html.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Jill Filipovic, *The Next Front in the Fight Against Sexual Assault*, REUTERS (Nov. 13, 2017), https://www.reuters.com/article/us-filipovic-rape-commentary/commentary-the-next-front-in-the-fight-against-sexual-assault-idUSKBN1DE2WD; *Criminal Cases*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases (last visited Sept. 12, 2018).

221. SEXUAL HARASSMENT DATA, *supra* note 1, at 1.

222. Harris et al., *supra* note 207, at 26.

223. JONI HERSCH, SEXUAL HARASSMENT IN THE WORKPLACE 5 (2015), https://law.vanderbilt.edu/phd/faculty/joni-hersch/2015_Hersch_Sexual_Harassment_in_the_Workplace_IZAWOL_Oct15.pdf.

224. *See, e.g.*, Matthew Cox, *Active Army Needs Up to 74,000 More Soldiers, Chief Says*, MILITARY.COM, http://www.military.com/daily-news/2017/06/09/active-army-needs-up-to-74000-more-soldiers-chief-says.html (last visited Sept. 12, 2018) (explaining that the Army needs more troops to deal with the operational tempo); Stephen Losey, *Gen. Mark Welsh Sounds Alarm on Undermanned Air Force*, A.F. TIMES (Dec. 1, 2015), https://www.airforcetimes.com/news/your-air-force/2015/12/01/gen-mark-welsh-sounds-alarm-on-undermanned-air-force (explaining that Gen. Welsh, Air Force Chief of Staff, believes that the Air Force is "fac[ing] critical manning shortages").

environment.[225] Members of the military already deal with enough stress; they do not need to face additional unnecessary pressures from within their own units.[226]

Outside the sexual harassment context, the *Feres* Doctrine is inequitable because it eliminates the potential for non-dependent family members of a service member to recover anything when the military only provides benefits to the deceased service member's dependents.[227] This is an issue when the service member dies without any dependents because nobody receives any benefits, and the *Feres* Doctrine still bars any suit brought for the service member's death.[228] Moreover, the *Feres* Doctrine allows some individuals to recover for an injury under the VBA when there is no negligence, whereas individuals injured due to torts committed against them may not receive anything if the military does not recognize their injury as warranting benefits.[229] Furthermore, the *Feres* Doctrine discriminates against individuals who choose to serve their country. Rather than allowing for the potential of non-uniform recovery, the Court has created a doctrine that mandates uniform non-recovery.[230]

D. PLAIN MEANING AND CIRCUIT CONFUSION

The *Feres* Doctrine originated as a reasonable rule.[231] The Court saw an issue with the FTCA and created a rule that it hoped would resolve that issue.[232] However, that rule is counter to the plain meaning of the FTCA.[233] This is problematic because the courts are supposed to start with the plain

225. *See* Losey, *supra* note 224.

226. *See* AM. PSYCHOLOGICAL ASS'N., THE MENTAL HEALTH NEEDS OF VETERANS, SERVICE MEMBERS, AND THEIR FAMILIES 1–2 (2013), https://www.apa.org/advocacy/military-veterans/mental-health-needs.pdf (describing the psychological stressors service members face).

227. *See* 38 U.S.C. § 1121 (2012) ("The surviving spouse, child, or children . . . of any veteran who died . . . shall be entitled to receive compensation . . . .").

228. *Id.*

229. *See, e.g.*, Costo v. United States, 248 F.3d 863, 865 n.2 (9th Cir. 2001) (demonstrating that the court's decision ignored the estate's ability to recover under the VBA as the alternative compensation scheme); *An Examination*, *supra* note 139, at 16 (explaining that no one in O'Neill's family received any compensation from the military because they were not her dependents).

230. United States v. Johnson, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting) ("The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification . . . . There seems to me nothing 'unfair' about a rule which says that, just as a serviceman injured by a negligent *civilian* must resort to state tort law, so must a serviceman injured by a negligent Government employee.").

231. David Saul Schwartz, Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992, 992 (1986) (describing how the *Feres* Doctrine originated to bar claims by individuals already receiving military compensation).

232. *Id.* at 993.

233. *See* 28 U.S.C. § 2680 (missing any language that bars recovery if an injury is incidental to the line of duty); *see also* Brooks v. United States, 337 U.S. 49, 53–54 (1949) ("Unlike the usual workman's compensation statute, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy." (citations omitted)).

meaning of a statute and interpret it as narrowly as possible.[234] Instead, the Supreme Court used *Feres* to create a broad exception to the FTCA.[235] This broad exception has created chaos throughout the various circuits.[236]

The cases barred by the courts using the *Feres* Doctrine cover a wide array of issues. Some of these cases include: "black servicemen claiming racially discriminatory punishments and duty assignments by a superior officer;[237] a servicewoman claiming to have been sexually assaulted by a superior;[238] [and] an army intelligence agent found dead . . . ."[239] These cases illustrate the common theme that what started off as a reasonable rule has quickly transformed into an unworkable mess.

In *Jaffee v. United States*, the Third Circuit first acknowledged that the *Feres* Doctrine bars claims for intentional torts as well as negligence.[240] This is a problem because it goes against the Supreme Court's recognition that the FTCA's plain meaning does not allow the Court to read the FTCA "to exclude all military personnel tort claims."[241] Yet, the Circuit Courts have managed to do just that. There is consistent inequity and confusion in the application of the *Feres* Doctrine to intentional torts among the lower courts.

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234. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also* Merritt. v. Dillard Paper Co., 120 F.3d 1181, 1185 (11th Cir. 1997) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself.").

235. Jonathan Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 4 (2003) ("Despite language in the Federal Tort Claims Act that only exempts combat-related injuries from liability, the Supreme Court engaged in what can be viewed as a quintessential exercise of judicial activism—crafting an immunity system to achieve values and objectives of its own design.").

236. This drastic expansion drove the Sixth Circuit to note:

> [T]he Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987). The court went on to convey its disagreement: "Although the doctrine itself as well as its recent expansion have been decried by various courts and commentators . . . we are bound to observe the Court's clear directive on this issue." *Id.* at 645.

237. Schwartz, *supra* note 231, at 992 & n.2 (discussing Chappell v. Wallace, 462 U.S. 296 (1983)).

238. *Id.* at 992 & n.3 (discussing Stubbs v. United States, 744 F.2d 58 (11th Cir. 1984)).

239. *Id.* at 992 & n.4 (discussing Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980)).

240. *See* Jaffee v. United States, 663 F.2d 1226, 1228, 1238–39 (3d Cir. 1981) (holding that the *Feres* Doctrine bars intentional tort claims regardless of the source from which the claim is derived).

241. John Astley, Note, United States v. Johnson: Feres *Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 198–201 (1988) (discussing the *Feres* Doctrine's continual expansion to bar more claims).

Many courts treat the individual tortfeasor as an extension of the government and thus protect him,[242] whereas other circuits do not consider the injury incidental to service.[243] This discrepancy permits non-uniform recovery. Even worse, in instances where intentional tortfeasors are shielded from liability, the lower courts have expanded the *Feres* Doctrine beyond the scope of the Supreme Court's interpretation.[244] In turn, the Supreme Court's refusal to hear a *Feres* Doctrine case since *Johnson* has left numerous individuals without recourse.

Because the *Feres* Doctrine is unclear, and its underlying rationales are rarely relevant in the cases to which it is applied, the lower courts have repeatedly voiced their disapproval of the *Feres* Doctrine and struggled to apply it consistently or equitably.[245] Therefore, the Supreme Court or Congress needs to re-examine the purpose for the *Feres* Doctrine and redefine the test to apply it more consistently and equitably.

IV. RECTIFYING *FERES*: INCENTIVIZING THE MILITARY TO FIX ITS PROBLEMS

This section advocates for a statutory amendment to the FTCA to allow service members, and the non-dependent family members of service members (who have no other remedy), to sue for their injuries. This strikes a balance to help alleviate the government's concerns regarding service members obtaining a double recovery and minimize the intrusion into military decisions, while ensuring injured service members receive a remedy for their injuries. Second, this section advocates for an amendment to the FTCA that will hold the individual tortfeasor liable for intentional torts under a Title VII regime, specifically for those intentional torts not listed in § 2680(h). Lastly, this section provides a means for the federal government to shield the individual tortfeasor from liability and avoid liability like any other employer subject to Title VII could.

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242. *See* Howard L. Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the* Feres *Doctrine*, 23 A.F. L. REV. 171, 172 (1983).

243. *See, e.g.*, Cross v. Fiscus, 830 F.2d 755, 757 (7th Cir. 1987) (refusing to extend protections to intentional tortfeasors in the intra-military context).

244. *See, e.g.*, *Jaffee*, 663 F.2d at 1228 ("Because the prior decisions of the Supreme Court and this court have held that plaintiffs' remedy of veterans' compensation is exclusive and that a cause of action for additional compensation would undermine military effectiveness, we hold that plaintiffs do not have a cause of action directly under the Constitution against the defendants in these circumstances.").

245. *See, e.g.*, Day v. Mass. Air Nat. Guard, 167 F.3d 678, 683 (1st Cir. 1999) ("Possibly *Feres* itself deserves reexamination by the Supreme Court. A few of *Feres*'s original reasons no longer seem so persuasive and intrusions by courts to grant equitable relief in military matters have become more familiar in recent years." (citations omitted)); Estate of Martinelli v. U.S., Dep't of Army, 812 F.2d 872, 874 (3d Cir. 1987) ("[A]ttempts by members of this court to limit the *Feres* doctrine have been consistently unsuccessful."); Monaco v. United States, 661 F.2d 129, 131–32 (9th Cir. 1981) ("Despite the development of these elaborate policy reasons for the Feres doctrine, the basis for the exception has recently become the subject of some confusion. . . . This confusion has led to widespread questioning of the Feres exception.").

A. AMENDING THE FERES *DOCTRINE*

The *Feres* Doctrine serves the purpose of shielding the federal government from tort liability for the negligence of its employees. However, many critics argue that Congress needs to amend the FTCA to allow for intentional torts like assault and battery,[246] adopt a "military discipline" test,[247] or eliminate the *Feres* Doctrine altogether.[248] These solutions either neglect individuals with no other means of recourse[249] or overlook the military's legitimate need to retain autonomy over ensuring discipline.[250] This Note does not attempt to eliminate the FTCA or fundamentally alter it; rather, it merely seeks to tweak the *Feres* Doctrine to provide an avenue to the courthouse for those individuals who have no other avenue of recourse. As such, this Note argues that Congress should intervene and override the *Feres* Doctrine to allow service members to bring intra-military suits against individual tortfeasors rather than treating intentional tortfeasors as an extension of the government.

First, Congress should statutorily allow non-dependent family members of service members, who have no dependents and no avenue of compensation under the VBA, to bring a civil action under the FTCA. This tweak takes the approach the Court recognized as an option in *Feres*, such that individuals who can receive compensation under the VBA are precluded from recovering civil damages as well.[251] Moreover, Congress should amend the FTCA to allow service members, or non-dependent family members, to bring a civil action against the federal government for recovery under the FTCA.

This solution provides individuals with no other form of recourse with a way to recover, but it does not open the courthouse doors to everyone. Additionally, limiting courthouse access to victims of intentional torts will help minimize the impact of permitting suits against the military and should

246. *See generally* Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731 (advocating for an amendment to the FTCA to provide sexual assault survivors a way to recover when their perpetrator is a federal employee).

247. Thomas M. Gallagher, Note, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident to Service" Analysis*, 33 VILL. L. REV. 175, 200–01 (1988) (describing a "military discipline" test as more equitable to determine whether a service member's suit should be barred).

248. *See* Turley, *supra* note 235, at 4 (describing the *Feres* Doctrine as "fundamentally flawed from its inception on both a constitutional and statutory basis").

249. See Gallagher, supra note 247, at 201 (acknowledging that discrimination suits would still be denied). This also fails to account for non-dependent family members who remain without recourse under this approach.

250. *See* Turley, *supra* note 235, at 4 ("This article will suggest that the *Feres* doctrine was fundamentally flawed from its inception on both a constitutional and statutory basis."). In advocating for overturning *Feres*, Turley's approach ignores the military's need for autonomy and freedom to make decisions without civilian courts second-guessing their decisions.

251. *See* Feres v. United States, 340 U.S. 135, 144 (1950); *see also* Brooks v. United States, 337 U.S. 49, 53–54 (1949) (recognizing that a service member's recovery could be reduced by the amount of their VBA benefits to avoid a double recovery).

alleviate the military's concerns that civilian courts will infringe upon its autonomy and decision-making ability. Furthermore, this amendment only includes intentional torts not already specifically prohibited in 28 U.S.C. § 2680(h), which means the government will still be immune for its negligent actions. Additionally, the approach will not lead to inequitable recovery based on location because the recovery criteria will be based on federal law, which means the recovery requirements will be uniform throughout the United States.

B. APPLYING TITLE VII

The second modification Congress should make is to statutorily declare that tortfeasors in the intra-military context are acting outside the scope of their employment when they commit an intentional tort.[252] This is similar to the approach the Supreme Court uses in the Title VII context when dealing with workplace discrimination.[253]

In this instance, Congress should add the following language to the end of 28 U.S.C. § 2680(h):

> This subsection is expressly limited to the enumerated intentional torts listed herein. A service member may sue a tortfeasor for violation of any intentional tort not listed herein. The tort victim shall not sue the United States government. Moreover, any claim brought by a service member under this subsection shall not be deemed incidental to service.

Moreover, Congress should delete the period at the end of 28 U.S.C. § 2680(j)[254] and add a comma and the following language to the end of the subsection:

> except for those claims allowed under subsection (h) of this section.

This proposed language protects the government from tort liability for its agents' actions by maintaining its sovereign immunity, which is reasonable because the government cannot as easily restrict its employees from committing intentional torts. However, victims are able to hold the individual tortfeasor civilly accountable for their actions because the tortfeasor is the "cheapest cost-avoider"[255] and can best take steps to prevent himself from committing an intentional tort.

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252. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006) (explaining that a principal is not liable for its agent's conduct when the agent is acting outside the scope of their employment).

253. *See infra* notes 272–75 and accompanying text.

254. "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (2012).

255. *See, e.g.*, Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1292 (1992) (defining the cheapest-cost avoider as "the person who could avoid an accident at [the] lowest cost").

These concerns are particularly potent in instances of sexual harassment or other IIED claims, because these are areas in which the public is the most concerned, especially right now.[256] The topic of sexual harassment and assault is currently front and center in the media,[257] and the American people hold the military to a higher moral standard than the average citizenry.[258] However, a recent Rand Study[259] found that an estimated 116,600 service members were sexually harassed in the past year.[260] More specifically, 22% of female service members reported being sexually harassed while 7% of males reported being sexually harassed.[261] The two types of sexual harassment faced by service members are *quid pro quo* harassment and hostile work environment.[262] "[*Q*]*uid pro quo* sexual harassment refers to conditions placed on a person's career or terms of employment in return for sexual favors."[263] This often entails "[t]hreats of adverse action" if the victim does not comply or promises of favorable treatment if the victim does comply.[264] Additionally, *quid pro quo* harassment can affect a third party or a bystander.[265]

256. Valerie A. Stander & Cynthia J. Thomsen, *Sexual Harassment and Assault in the U.S. Military: A Review of Policy and Research Trends*, 181 MIL. MED. 20, 20 (2016) ("In the past decade, there has been increasing concern among political and military leaders, as well as the American public, regarding the incidence of sexual harassment and assault in the military.").

257. *See, e.g.*, Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (describing how Harvey Weinstein paid off numerous women over a prolonged period of time to keep them from accusing him of sexual harassment); Phil McCausland, *Sen. Al Franken 'Embarrassed and Ashamed' Following Sexual Harassment Allegations*, NBC NEWS (Nov. 26, 2017, 11:03 PM), https://www.nbcnews.com/politics/congress/sen-al-franken-embarrassed-ashamed-following-sexual-harassment-allegations-n824026 (explaining how several women accused Sen. Al Franken of sexually assaulting and harassing them); Erik Ortiz & Corky Siemaszko, *NBC News Fires Matt Lauer After Sexual Misconduct Review*, NBC NEWS (Nov. 30, 2017, 6:39 AM), https://www.nbcnews.com/storyline/sexual-misconduct/nbc-news-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831 (explaining that NBC fired Matt Lauer after sexual misconduct and for creating a hostile work environment).

258. GEORGE R. LUCAS, JR., MILITARY ETHICS: WHAT EVERYONE NEEDS TO KNOW 105 (2016).

259. The RAND Corporation is a nonprofit that serves to "improve policy and decisionmaking through research and analysis." *History and Mission*, RAND CORP., https://www.rand.org/about/history.html (last visited Sept. 13, 2018). The RAND Corporation "conducted an independent assessment of sexual assault, sexual harassment, and gender discrimination in the military." RAND CORP., 2 SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY xvii (Andrew R. Morral et al. eds., 2015), https://www.rand.org/pubs/research_reports/RR870z2-1.html.

260. RAND CORP., *supra* note 259, at 33.

261. *Id.* at 34 tbl. 4.3.

262. ROSEMARIE SKAINE, SEXUAL ASSAULT IN THE U.S. MILITARY: THE BATTLE WITHIN AMERICA'S ARMED FORCES 40 (2016).

263. *Id. Quid pro quo* is rare in comparison to hostile work environment. However, despite it occurring less often, it can still constitute a serious crime. *Id.* at 41. Many people who experienced *quid pro quo* harassment also experienced a sexually hostile work environment. *Id.*

264. *Id.* at 40.

265. *Id.*

Meanwhile, a hostile work environment is defined as any conduct that is "intimidating, hostile, or offensive to reasonable people."[266] Furthermore, "sexual favoritism or general discrimination may occur when a person feels unfairly deprived of recognition, advancement, or career opportunities because of favoritism shown to another soldier or civilian employee on the basis of a sexual relationship."[267] The Rand Study recommended that the military "[i]mprove policies and programs to increase the reporting of the full range of sexual assaults defined by the UCMJ, including those that are not perceived as sexual acts."[268] It further recommended that the military "[e]xpand sexual harassment and gender discrimination monitoring, prevention, and accountability practices."[269] This information suggests that sexual harassment is a real problem in the military that is not being adequately addressed.[270] Applying a Title VII regime to the military provides extra incentive for the military to take additional measures to reduce the rate of sexual harassment. Additionally, this will enable service members to focus on the mission rather than on their hostile work environment.

In other similar instances dealing with injustice, the federal government responded to the public outcry against the improper use of police force[271] by amending the FTCA to allow individuals to sue under § 2680(h) for intentional torts committed by law enforcement officials.[272] A similar amendment here would serve the same purpose, especially for intentional torts not covered under § 2680(h), such as IIED, specifically arising from sexual harassment claims. It would send tortfeasors a clear message that the military does not condone their actions.

Taking an approach similar to Title VII's makes the most sense for altering the way intra-military disputes involving intentional torts are addressed. Under Title VII, the Supreme Court had to decide whether an employer is vicariously responsible when its employees sexually harass or

266. *Harassment*, EEOC, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Sept. 13, 2018).

267. SKAINE, *supra* note 262, at 40.

268. RAND CORP., *supra* note 259, at xxiv.

269. *Id.* at xxv.

270. *See id.* at xxiv–xxvii.

271. Congress amended the FTCA in response to public outcry over an incident in which state and federal narcotics agents mistakenly stormed the homes of two Illinois' families while looking for suspected cocaine dealers. Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 500–07 (1976). The local and national news media widely reported the incident, which contributed to the public response. *Id.*; *see also Hearings on Reorganization Plan No. 2 of 1973 Before the Subcomm. on Reorganization, Research, and Int'l Orgs. of the S. Comm. on Gov't Operations*, 93d Cong. 461–62, 475–76 (1973) (providing the homeowners' description of the agents mistakenly entering their homes).

272. Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (carving out a specific exemption to allow people to sue for intentional torts committed by law enforcement personnel).

discriminate against their subordinate employees.[273] The Supreme Court determined that employers are not necessarily vicariously liable for their employees' intentional torts.[274] However, there are limited instances in which the employer can be held liable for sexual harassment, such as if there a hostile work environment.[275] More recently, the Supreme Court has determined that an employer is vicariously liable for a supervisor's conduct when the employer empowered the employee "to take tangible employment actions against the victim."[276]

C. AN ALTERNATIVE TITLE VII APPROACH

Alternatively, if Congress recognizes intra-military IIED claims as within the scope of the tortfeasor's employment, Congress should statutorily prescribe that the courts combine the *Feres* Doctrine and Title VII approaches to IIED and other sexual harassment-related claims. Under this regime, the federal government can still use the *Feres* Doctrine to bar any claims against it if it can prove, by a preponderance of the evidence, that (1) it took appropriate actions to remedy the situation after it was made aware of the situation;[277] and (2) the service member unreasonably failed to take advantage of preventative or corrective opportunities provided by the military, or to avoid the harm by another means.[278] To permit claims, Congress should delete the period at the end of 28 U.S.C. § 2680(j) and add a comma and the following language to the end of the subsection:

> except for those claims allowed under subsection (o) of this section.

Moreover, Congress should add a subsection (o) to 28 U.S.C. § 2680 and borrow the relevant language from Title VII[279] to provide:

> (a) Employer practices**.** It shall be an unlawful employment practice for the military—
>
> (1) to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex;[280]

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273. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72–73 (1986) (holding that an employer can be vicariously liable if there is a hostile work environment).

274. *Id.* at 72 ("[T]he Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.").

275. Faragher v. City of Boca Raton, 524 U.S. 775, 777 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.").

276. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

277. *See Faragher*, 524 U.S. at 806–07.

278. *Id.*

279. 42 U.S.C. 2000e-2(a) (2012).

280. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (determining that sex encompasses sexual harassment under Title VII).

> or
>
> (2) to limit, segregate, or classify the military's employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's sex.

This language both allows the government to take appropriate measures to rectify a situation and incentivizes it to take service members' allegations of IIED and sexual harassment seriously. Furthermore, within the military hierarchy, allegations of sexual harassment do not need to be against a direct supervisor; rather, it is sufficient for the claim to arise against a higher ranked service member or against someone in a position of authority over the injured service member. This is essential because the structure of the military hierarchy does not lend itself to focusing on the supervisor/subordinate role.

Under this modified Title VII/*Feres* Doctrine regime, if the military does not take appropriate steps to rectify the situation, then, as the Court has recognized in the Title VII context, the victim could sue the government for damages. However, if the military takes the appropriate measures to investigate sexual harassment or other IIED claims, then the service member will be barred from bringing a claim against the government. These measures would consist of investigating the incident and responding in a proportionate manner based on the severity of the incident. This will contribute toward resolving harassment issues within the military because it will force leadership to crack down on tortfeasors to prevent the government from paying out civil damages. Similarly, if military leadership wants civilian courts to not second-guess its judgments in the sexual harassment context, all it needs to do is stop service members from sexually harassing other service members.

Moreover, harassment issues would follow the normal Title VII procedures. This means that if the sexual harassment led to actual repercussions, which could include a negative job review of the victim or a negative job assignment, then the military could not take remedial steps and avoid liability for the tortfeasor's actions.[281] Rather, the government is held strictly liable because the service member is already harmed. However, the service member's claim will still incentivize the military to act to prevent harm to other service members.

Several Congressman have conveyed their dismay with the *Feres* Doctrine and expressed a desire to change it.[282] Now is the time for Congress to realize

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281. *Faragher*, 524 U.S. at 778 ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action . . . .").

282. *See, e.g.*, Rebecca Huval, Feres *Doctrine and the Obstacles to Justice for Military Rape Victims*, INDEP. LENS (May 9, 2013), http://www.pbs.org/independentlens/blog/feres-doctrine-and-the-obstacles-to-justice-for-military-rape-victims (statement of Senator Kirsten Gillibrand) ("We may want to look at if we can create some exceptions for victims of sexual assault."); *An Examination*, *supra* note 139, at 1 (statement of Sen. Arlen Specter) ("I have introduced legislation to amend

that it and the Supreme Court are "[c]aught in an endless game of hot potato, [and] the *Feres* doctrine has eluded ownership for over half a century—if the courts won't accept responsibility for their creation, then it's time for Congress to rescue it from their hands."[283]

V. CONCLUSION

In conclusion, this Note explained the disparate treatment that has resulted from Congress's efforts to allow tort victims to sue the government. Instead of creating equality and risking non-uniform recovery, the Supreme Court created its own judicial doctrine which has resulted in uniform non-recovery. Furthermore, this Note has struck a balance between protecting the military's important need for maintaining discipline and ensuring service members do not have the courthouse door shut in their face. Allowing individuals to sue is equitable and reinstates the FTCA's plain meaning. Additionally, holding intentional tortfeasors responsible for their actions and implementing a parallel Title VII regime in the military context provides an incentive for the military to address sexual harassment claims or be held civilly liable for the actions of their personnel.

the so-called Feres doctrine because it seems to me that the doctrine has produced anomalous results which reflect neither the will of the Congress nor common sense.").

283. Natelson, *supra* note 6.